

NTSB Order No.
EM-83

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 31st day of December, 1980

John B. Hayes, Commandant, United States Coast Guard,

vs.

William Gilbert Burke, Appellant

Docket ME-81

OPINION AND ORDER

The appeal herein is from a decision of the Commandant (Appeal No. 2181) affirming an order revoking appellant's license (No. 443686) and merchant mariner's document (No. Z-85548-DI) and all other valid licenses and/or documents issued to him by the United States Coast Guard. The decision appealed from was issued as a result of a remand to the Commandant adopted by the Safety Board in Order EM-51, adopted June 14, 1976. In Order EM-51 the Board:

- (1) Vacated and set aside a revocation order issued by the Commandant (Appeal No. 2021; adopted May 7, 1975), with respect to appellant's merchant mariner's document; and
- (2) Modified the order with respect to appellant's license to provide for a suspension of appellant's license, reserving to appellant the authorization contained in his temporary document for service as a night mate on vessels berthed in the United States. Moreover, the Board remanded the entire proceeding to the Commandant so that he might further remand the matter to an administrative law judge of the Coast Guard with instructions to reopen appellant's hearing for redetermination of his competence to perform duties at sea in a licensed capacity.¹

¹Appellant's merchant mariner's document would permit him to serve at sea in an unlicensed capacity. See 46 CFR Part 12. His license entitles him to serve in any capacity for which the license was issued. See 46 CFR Part 10. Appellant's license permitted him to serve as master or mate on a vessel of unlimited tonnage. His attorney stated that, prior to 1973, he had served for many years

In order to clarify the Board's findings in Order EM-51 and to further clarify the purpose of the remand, we set forth those findings verbatim:

"Upon consideration of the briefs of the parties and the entire record, the Board concludes that appellant's mental disability to perform duties in a licensed capacity at sea, within the timeframe determined by the law judge, was established by reliable, probative, and substantial evidence. Although the findings of the law judge, as modified herein, are adopted as our own, we further conclude that they do not have a requisite sufficiency to sustain the sanction here imposed. The sanction will be modified and the case remanded for a redetermination of appellant's current state of fitness for sea duty."

The Board then went on to state:

"The sanction of revocation should not be imposed where the medical evidence relied upon as evidence of a mental disability also indicates that it may be alleviated by medical treatment, and that the afflicted person may be restored to active duty within a definite period of time."

In short, the Board accepted the deposition of Dr. Maria Sarrigiannis, Medical Director and Chief of Psychiatry, United States Public Health Service, as evidence sufficient to prove mental disability to perform duties in a licensed capacity at sea.² Since no specific diagnosis was either pleaded or proved,³ however, the Board concluded that whatever mental disability was arrived at was treatable. That conclusion was supported by Dr. Sarrigiannis' letter of January 22, 1974, stating that appellant

as a mate, with a clear record. Appellant's clear record was verified by a Coast Guard Special investigation. (Inv. Officer's Exh. 7).

²The deposition of Dr. Sarrigiannis meets the minimum evidentiary requirements set forth by the Coast Guard in 46 CFR ¶ 5.20-95.

³As the Board pointed out in Order EM-51, Dr. Sarrigiannis offered to produce clinical reports and hospital records to support a diagnosis. (Sarrigiannis deposition, page 11); however, no such corroboration was ever placed in evidence.

was at that time, fit for duty as a night mate while the vessel is in port.

As a result of the remand, Administrative Law Judge Thomas McElligott reopened the matter for the taking of further evidence and testimony on the limited question of appellant's current mental competence to perform duties at sea in the licensed capacity. On February 14, 1978, the law judge issued an order revoking appellant's license (No. 443686) and merchant mariner's document (No. Z-85548-DI) based on a general finding of mental incompetence. On February 11, 1980, the Commandant affirmed the order of the law judge stating that he had adopted a strict policy of requiring revocation of all licenses and documents when mental incompetence is found proved (Appeal No. 2181).

By virtue of the remand, the medical evidence of record was expanded to include an evaluation by Dr. Phillip D. Walls, Deputy Chief of Psychiatry, United States Public Health Service Hospital, Baltimore, Maryland (Exhibits VII and VIII). The report and its supplement are dated September 16, 1977, and September 21, 1977, respectively; and are also signed by Dr. Clifford L. Culp, Jr., the Chief of Psychiatry, U.S. Public Health Service at Baltimore. Prior to remand, the record contained a psychiatric evaluation by Dr. Morton Marks, a psychiatrist in private practice, made in October 1975 at the request of appellant, and an updated evaluation by Dr. Marks dated September 13, 1977.

Appellant, represented by counsel throughout these proceedings, has filed a brief on appeal from the Commandant's Decision No. 2181. He contends that:

- (1) The revocation of appellant's merchant mariner's document, i.e., his authorization to sail as an unlicensed seaman, was by prior Board Order (EM-51) vacated and set aside;
- (2) The three medical opinions that are available in the record conclude that appellant is fit and competent to serve in an unlicensed capacity;
- (3) The additional evidence offered by the Coast Guard on remand, i.e., the psychiatric report of Dr. Walls, is inadmissible hearsay and does not contain the conclusions necessary to support an order revoking appellant's license. The revocation of that license ignores the other evidence of record, i.e., the medical conclusions of Dr. Marks and appellant's meritorious service as a night mate during the years of these proceedings;

- (4) The Coast Guard has the burden of proof and it failed to offer a physician's testimony or his deposition. Dr. Wall's medical evaluation is not a business record compiled in the course of medical treatment but was prepared specifically for use in litigation. As a result, it does not meet the criteria set forth in Richardson v. Perales, 402 U.S. 389, 91 S. Ct. 1420(1971), and denies appellant the due process to which he is entitled.

Appellant requests that the Board:

- (1) Confirm its prior order(EM-51) vacating any sanction with respect to appellant's merchant mariner's document; and
- (2) Vacate the order of revocation and dismiss the case.

In the alternative, he requests that, only if Dr. Walls' reports are deemed admissible the Board suspend the use of appellant's officers license for sea duty only until such time as appellant is certified by a United States Public Health Service hospital as mentally competent to serve as a licensed officer at sea. The Commandant has filed a brief reply. He first sets forth a number of statements about matters that are not in contention. These are that:

- (1) The National Transportation Safety Board (NTSB) is an independent agency of the Federal government and is not a part of the Department of Transportation;
- (2) The Commandant's decision constitutes "final action" as that term is set forth in 5 U.S.C.¶ 557(b); and
- (3) The NTSB is statutorily authorized to review on appeal the decisions of the Commandant of the Coast Guard (46 U.S.C. 1903(a)(9)). The scope of the Safety Board's review power has not been clearly by Congress.

He requests that the Board reject appellant's arguments on the issue of the role of the Commandant's Decision in the statutory scheme as that of an intermediate reviewer and affirm the Commandant's decision.

Although we do not find that any of the Commandant's contentions are crucial to resolution of the matter at issue herein, we believe it is helpful to dispose of the matter of the scope of the Safety Board's review power.

By virtue of the Independent Safety Board Act of 1974, the Safety Board was given the authority to review on appeal the

decisions of the Commandant in actions involving suspensions or revocations, inter alia, of Merchant Marine documents and licenses (49 U.S.C. 1903(a)(9)(B)). The scope of Board review is clearly set forth in Section 556 of the Administrative Procedures Act (APA) (5 U.S.C. ¶ 556) and has been further delineated in regulations promulgated by the Board. Those regulations are known as Rules of Procedure for Merchant Marine Appeals from Decisions of the Commandant, U.S. Coast Guard (49 CFR Part 825). Issues on appeal are set forth in Section 825.15⁴ of those Rules. Further clarification of the issues to be considered on appeal can be found in the APA at Section 556(d) which states that:

"A sanction may not be imposed except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence."

In short, the Board's role in the review of the Commandant's Decisions is clearly set forth in the statute, the Administrative Procedures Act, and the Safety Board Rules.

Upon consideration of the briefs of the parties, the medical evidence developed as a result of the Board's remand, and the entire record, the Board concludes that appellant is currently fit for sea duty in any unlicensed capacity but that his treatable emotional difficulty causes him to be unsuitable for service in any licensed capacity until such time as a medical officer of the United States Public Health Service certifies that his emotional problem is sufficiently under control to resume his normal duties as a licensed mate at sea. Our decision in regard to mate duties does not preclude the Commandant from continuing to issue appellant's special document for service as a night mate on berthed vessels. We leave that matter solely to the discretion of the Commandant.

⁴Section 825.15 reads as follows:

" ¶ 825.15 Issues on appeal.

The only issues that may be considered on appeal are:

- (a) A finding of a material fact is erroneous;
- (b) A necessary legal conclusion is without governing precedent or is a departure from or contrary to law or precedent;
- (c) A substantial and important question of law, policy or discretion is involved, or
- (d) A prejudicial procedural error has occurred."

Turning now to appellant's contentions, as we have already pointed out, his first contention is correct, i.e., the revocation of appellant's merchant mariner's document was by prior Board Order vacated and set aside. His second contention, that the three medical opinions available in the record conclude that appellant is fit and competent to serve in an unlicensed capacity, is also correct.

Appellant's third contention, that Dr. Wall's psychiatric report is inadmissible because it is hearsay, is not correct. We agree that Dr. Wall's report does not qualify as a business record as that term is described in 28 U.S.C.¶ 1732 since it was not prepared in the course of medical treatment. However, this argument goes to the weight that can be given to the report and not to its admissibility since hearsay evidence is admissible in administrative proceedings at the discretion of the presiding officer. Moreover, we have been given no reason to doubt that authenticity of the documents. However, there is a question of weight to be assigned to the opinions of psychiatrists when they step out of their role of medical diagnosis and treatment and give opinions concerning the mental competence that is needed in order to carry out the duties of certain assigned position, such as night mate, unlicensed seaman, or licensed mate. Furthermore, a reading of Dr. Walls' reports indicates that he was not aware that a night mate can serve unsupervised at certain times until after he had completed the first report thereby revealing that his knowledge of the duties and responsibilities of the night mate may be somewhat limited. In any event, it is Dr. Walls' medical opinion that appellant should not serve as supervisor and that he should be supervised.

The composite medical picture drawn by Dr. Marks and Dr. Walls, in his original opinion, is that appellant is fit to serve as a mate or seaman aboard ship. Dr. Walls, however, amended his original medical opinion based on the fact that he was informed that a mate must at times function unsupervised as the only officer on the bridge. As a result, he concluded that appellant is fit to serve as a seaman but not as an officer, i.e., not in an unsupervised capacity, aboard ship. In a letter dated September 13, 1977, Dr. Marks reported that appellant had consulted him again on July 5, 1977. At that time, Dr. Marks concluded: "I believe that physically and psychologically he is capable of serving in his usual capacity as a mate." From these reports, we believe it is fair to conclude that Dr. Walls believes that appellant can function in any seaman capacity so long as he is supervised. Dr. Marks believes that he can function, "in his usual capacity as a mate." The record contains documents that indicate that appellant has served in the night mate capacity since 1974 without incident. His record prior to 1974, during the years when he served as a mate

aboard ships, is also clear, as Coast Guard special investigation reveals (Inv. Officer's Exh. 7).

Moving now to the subject of medical diagnosis of appellant's mental disorder, we find that the closest similarity to a diagnosis is found in Dr. Sarrigiannis' letter dated January 22, 1974. She apparently diagnosed "emotional difficulties" and indicated in her letter that these would not disqualify for night mate in port, that they are treatable, and that appellant should be reevaluated in 8 or 9 months to see whether he is suitable for active duty on sea-going vessels. In his 1977 evaluations, Dr. Walls concluded that appellant had had the three psychotic breaks in 1960, and 1973, but he is fit for duty as a seaman aboard ships.

A fourth issue placed in contention by appellant's counsel is the acceptability of the evidence set forth at the remanded hearing. The Supreme Court has set up rigid standards of due process for administrative hearings that involve the right of an applicant to engage in a business, trade, or occupation. These are set forth in Schwabe v Bd. of Bar Examiners, 353 U.S. 232, 77 S. Ct. 752, 1 L.Ed. 2d 796 (1957).⁵ One of those standards is the right of confrontation and cross-examination. At the remanded hearing, appellant was not afforded the right to confront or to cross-examine the proponent of the only evidence that the Coast Guard presented (Dr. Walls). However, at the initial hearing, appellant was afforded opportunity to confront and cross-examine the Coast Guard's witness (Dr. Sarrigiannis), not at the hearing but at the deposition. The Board has already addressed the challenges to admissibility of the deposition of Dr. Sarrigiannis and has not found them convincing. As a result, even at the opening of the remanded hearing, there was a presumption that appellant had had an emotional problem, that it was treatable, and that he should be limited to duties as a night mate on vessels berthed in United States harbors until such time as the United States Public Health Service reevaluated him for duties at sea. At the remanded hearing, in view of the presumption, the Coast Guard merely placed in evidence the report of Dr. Walls thereby relying on the prior deposition of Dr. Sarrigiannis to provide the "confrontation" needed to fulfill appellant's 14th Amendment right.

The Board believes that the Coast Guard has at least raised a valid presumption that appellant's 1960 and 1970 medical treatment indicates that he has had an emotional disorder. He has not

⁵IN Schwabe, the Court stated:

"A State cannot exclude a person from the practice of law or from any other occupation in a manner and for reasons that contravene the due process or equal protection clause of the 14th Amendment.

introduced any evidence to rebut that presumption. The most convincing information concerning the current state of appellant's mental health indicates that he is qualified to be an licensed seaman but not a supervisor. In short, we are compelled by the available evidence to reach the conclusion that we do reach herein.

In the light of the new medical evidence now available in the record we see no reason to deviate from the position taken by the Board in Order EM-51. In short, we conclude now as we did then that appellant had a treatable emotional disorder. On the basis of the new medical evidence alone, we conclude that appellant's current mental status is satisfactory but that his history of "emotional difficulties" causes him to present a risk of a future "emotional difficulty" that disqualifies him for work in a supervisory capacity. Dr. Walls' amended report reveals that he was informed by the Coast Guard that a mate is at times the sole officer on the bridge and, in that capacity, he is unsupervised. We might also note that, as sole officer on the bridge, the mate can exercise certain limited supervisory duties.

In light of the foregoing, the Board concludes that appellant is entitled to serve as an unlicensed seaman, a position that is supervised and that carries no supervisory responsibilities, until such time as he is certified by a medical officer of the United States Public Health Service to serve in a licensed capacity. As the Board noted in Order EM-51, appellant's emotional disorder has not been found to constitute a permanent disability and there is no showing that appellant is prone to violence.

We realize, of course, that the Board's Order in this proceeding provides no relief to appellant with respect to his current occupation as night mate. Appellant is currently functioning in that capacity by virtue of a temporary document issued by the Coast Guard pending disposition of this appeal.⁶ The Board has no authority to require the issuance of temporary or extraordinary licenses; hence, we leave the matter of night mate duties to the discretion of the Commandant.

ACCORDINGLY, IT IS ORDERED THAT:

- (1) Appellant's appeal be and it hereby is granted in part, and denied in part; and
- (2) The revocation order of the Commandant be and it hereby

⁶The temporary document was renewed on May 22, 1978, as a result of an order of the U.S. District Court, Southern District of Texas (C.A. 74-H-1411; a copy of which is in the record.)

is vacated and set aside with respect to appellant's merchant mariner's document; and modified to provide for a suspension of appellant's license until such time as he is certified by a medical officer of the United States Public Health Service to serve in a licensed capacity.

KING, Chairman, DRIVER, Vice Chairman, McADAMS, and GOLDMAN, Members of the Board, concurred in the above opinion and order. BURSLEY, Member, did not participate.